Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 JUNE 10, 1992 No. 24

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 92–50)

REVOCATION OF JAMES WOODS & CO., INC., TO GAUGE IMPORTED PETROLEUM AND PETROLEUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of approval of a commercial gauger.

SUMMARY: James Woods & Co., Inc., located at 116 John Street, Suite 814, New York, New York 10038, has requested that the U.S. Customs Service revoke its commercial gauger approval. Accordingly, pursuant to Part 151.13 (19 CFR 151.13) of the Customs Regulations, notice is hereby given that the Customs commercial gauger approval of James Woods & Co., Inc. has been revoked without prejudice.

EFFECTIVE DATE: May 15, 1992.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave. NW, Washington, D.C. 20229 (202) 566–2446.

Dated: May 26, 1992.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, May 29, 1992 (57 FR 22862)]

(T.D. 92–51)

COUNTRY OF ORIGIN MARKING FOR THE FORMER YUGOSLAV REPUBLICS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of acceptable names of the independent states formerly parts of Yugoslavia for purposes of country of origin marking under 19 U.S.C. 1304.

SUMMARY: On April 7, 1992, the United States recognized Bosnia-Hercegovina, Croatia, and Slovenia as sovereign and independent states, announcing that consultations towards establishing full diplomatic relations would begin immediately. This notice advises the public of the names and English spellings for the new states and specifies the geographic areas which shall continue to be considered to comprise Yugoslavia for purposes of country of origin marking. The notice also establishes a transition period during which Customs will permit the importation of merchandise from the newly-independent states with the marking, "Yugoslavia".

EFFECTIVE DATE: June 3, 1992.

FOR FURTHER INFORMATION CONTACT: Edward M. Leigh, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202–566–2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Pursuant to section 304 Customs may determine the character of the words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin, and may require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of an article.

In view of the political independence of Bosnia-Hercegovina, Croatia, and Slovenia, and recognition of their independent status by the U.S. as of April 7, 1992, merchandise originating in those countries and imported into the U.S. has become subject to marking with the English names of those countries pursuant to 19 U.S.C. 1304. Customs has been advised by the Department of State that the short form English names of the three newly independent countries are as indicated above: "Bos-

nia-Hercegovina", "Croatia", and "Slovenia". At this time the Department of State has not identified any approved long form names in English for the three countries. It is acceptable to Customs for merchandise to be marked using long form names such as "Republic of _____", provided that the short form name is part of the phrase. With respect to abbreviations, Customs is aware of only one which would satisfy the marking requirements. It would be acceptable to shorten the name "Bosnia-Hercegovina" to "Bosnia" for these purposes.

Recognizing that manufacturers and importers may need time to adjust to these changes, and that an abrupt change could cause undue hardship, Customs will permit goods from Bosnia-Hercegovina, Croatia, and Slovenia to be marked "Yugoslavia" until April 7, 1993. After that date all merchandise originating in Bosnia-Hercegovina, Croatia, and Slovenia will be required to be marked with the new names as set forth above.

There is no change in the names to be used for marking goods from the non-independent parts of Yugoslavia. However, in accordance with the foregoing, after April 7, 1993, only merchandise produced in the remaining regions of Yugoslavia, *i.e.*, Macedonia, Montenegro, and Serbia, will be permitted to be marked as originating in Yugoslavia for purposes of 19 U.S.C. 1304. It is noted that the U.S. has announced its intention, subject to further negotiations, to recognize the independence of Macedonia. In that event, Customs will adopt corresponding country of origin marking requirements for products of Macedonia.

Dated: May 28, 1992.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Commercial Operations.

[Published in the Federal Register, June 3, 1992 (57 FR 23455)]

U.S. Customs Service

General Notice

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 7–1992)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of April 1992 follow. The last notice was published in the CUSTOMS BULLETIN on April 2, 1992.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, Room 2104, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 566–6956.

Dated: May 28, 1992.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC#			EFF DT	EXP DT	NAME OF COP, TMK, TNM O
COP	92	00099	19920401	20120401	EASTMAN MACHI : BLUE ST
	92	00100	19920406	20120406	BEAR WITH GIFT, RAINBOW
	92	00101	19920406	20120406	HALLOWEEN BEAR BAGS, BE
	92	00102	19920406	20120406	FUN FLAVORS SCENTED LIP
	92	00103	19920406	20120406	CHRISTMAS BEAR BAG, BEA
	92	00104	19920406	20120406	DARKWING DUCK
	92	00105	19920409	20120409	COASTER 1992 CATALOG
	92	00106	19920410	20120410	ACER VGA VERSION 1.00
	92	00107	19920410	20120410	ACER VIDEO AND MOUSE CO
	92	00108	19920410	20120410	ACER VIDEO AND MOUSE CO
	92	00109	19920410	20120410	ACER EISA BIOS VERSION
	92	00110	19920410	20120410	ACER 486 BIOS VERSION I
	92	00111	19920410	20120410	TEENAGE MERMAID
	92	00112	19920413	20120413	HAPPY SHIRTS GECKO
	92	00113	19920413	20120413	ELDORADO
	92	00114	19920415	20120415	DANCING SALLY DOLL
	92	00115	19920417	20120417	TEENAGE MERMAID
	92	00116	19920417	20120417	MUSICAL MERMAID
	92	00117	19920417	20120417	POINSETTIA CANDLE
	92	00118	19920417	20120417	LIL DUMPLING
	92	00119	19920417	20120417	LU LU
	92	00120	19920417	20120417	MISSY
	92	00121	19920417	20120417	BUNNYKINS
	92	00122	19920417	20120417	MUSICAL HAPPY CLOWN
	92	00125	19920422	20120422	ATH-SHF2 (STYLE A)
	92	00131	19920410	20120410	ACER 1030 BIOS VERSION
SUBTOTAL RECORDATION TYPE			26		
TMK	92	00166	19920406	20090425	LILLIE RUBIN
	92	00167	19920406	20050917	THE ASCII GROUP
	92	00168	19920406	20120406	DUNHILL
	92	00169	19920406	20011029	SCISSOR HANDLE DESIGN
	92	00170	19920406	20070722	PRECISION
	92	00171	19920406	20050625	CURVEX
	92	00172	19920406	20000102	O'RITE
	92	00175	19920410	20010505	SEA BREEZE
	92	00176	19920413	20000417	CONFIGURATION OF HAIR F
	92	00177	19920413	20020208	CROCK-POCK
	92	00178	19920413	20081025	GECKO
	92	00179	19920413	20081129	MAUI GECKO
	92	00180	19920413	20081115	GECKO
	92	00181	19920413	19991125	DEL MONTE SHIELD DEVICE
	92	00182	19920413	19991125	DEL MONTE
	92	00183	19920413	20060902	S100
	92	00184	19920413	20011026	MACY'S
	92	00185	19920413	20070214	THOMSON
	92	00186	19920413	19990731	THOMSON II
	92	00187	19920413	20010901	THOMSON SHIRTMAKERS

MS SERVICE
DDED IN APRIL 1992

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DETAIL

OR MSK	OWNER NAME
TREAK II	EASTMAN MACHINE COMPANY
N BEAR BAGS	PLATINUM MANAGEMENT, INC.
EAR WITH TRICKS	PLATINUM MANAGEMENT, INC.
P GLOSS	IMPERIAL TOY CORPORATION
AR WITH GIFT II	PLATINUM MANAGEMENT, INC.
	WALT DISNEY COMAPNAY
	COASTER CO. OF AMERICA
ONTROLLER V. 2.00	ACER INCORPORATED
ONTROLLER V. 1.00	ACER INCORPORATED
1.00	ACER INCORPORATED
1.00	ACER INCORPORATED
	ACER INCORPORATED
	BEST CONSUMER PRODUCTS, INC.
	HAPPY SHIRTS INC.
	DYNA CO., LTD.
	DOLLY DOLLS & TOYS FTY., LTD.
	BEST CONSUMER PRODUCTS, INC.
	BEST CONSUMER PRODUCTS, INC
	ARMADILLO WAX HORKS, INC.
	BEST CONSUMER PRODUCTS, INC.
	BEST CONSUMER PRODUCTS, INC.
	BEST CONSUMER PRODUCTS, INC.
	BEST CONSUMER PRODUCTS, INC.
	DOLLY DOLLS & TOYS FTY., LTD.
	AMERITEX, INC.
1.00	ACER INCORPORATED
	LILLIE RUBIN AFFILIATES, INC.
	ASCII GROUP, INC.
	ALFRED DUNHILL LIMITED
	KINGSHEAD CORPORATION
	GRUEN PRECISION, INC.
	GRUEN PRECISION, INC.
	GREAT UNION CORPORATION
	CLAIROL INCORPORATED
ROLLER ENDS	CELESTE AND COMPANY
	RIVAL MANUFACTURING COMPANY
	GECKO TRADING COMPANY
	GECKO TRADING COMPANY
	GECKO TRADING COMPANY
E	DEL MONTE CORPORATION
	DEL MONTE CORPORATION
	BROOKSIDE IMPORT SPECIALTIES INC
	R. H. MACY & CO., INC.
	SALANT CORPORATION
	SALANT CORPORATION
	SALANT CORPORATION

REC#			EFF DT	EXP DT	NAME OF COP, TMK, TNM
TMK	92	00188	19920413	19960501	THOMSON TAILORED
	92	00189	19920413	20081011	THOMSON & COMPANY EMB
	92	00190	19920413	19980207	MADE IN THE SHADE
	92	00191	19920413	19960114	OBION
	92	00192	19920413	19961026	THOMSON TENNIS
	92	00193	19920413	20010723	DUCK HEAD
	92	00194	19920413	20061025	DUCK HEAD
	92	00195	19920413	20071208	DESIGN OF DUCK HEAD P
	92	00196	19920413	20071208	DUCK HEAD WITH LABEL
	92	00197	19920413	20111231	SPRAY GUN DESIGN
	92	00207	19920415	20010903	TRUEVISION WITH DESIG
	92	00208	19920415	19980301	ANGULAR BAR DESIGN
	92	00209	19920416	20010507	DESIGN OF OBSESSION F
	92	00210	19920416	20041016	TIMBERLAND
	92	00211	19920416	20050820	TIMBERLAND AND TREE D
SUBTOTAL RECORDATION TYPE				35	
TNM	92	00001	19920413	99999999	ALL-STATE WELDING PRO
	92	00002	19920414	99999999	COMBE INCORPORATED
SUBTOTAL RECORDATION TYPE				2	
TOTAL RECORDATIONS ADDED THIS MONTH				63	

TOMS SERVICE
ADDED IN APRIL 1992

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DETAIL

M OR MSK	OWNER NAME
BLEM	SALANT CORPORATION
	SALANT CORPORATION
	SALANT CORPORATION
	SALANT CORPORATION
	SALANT CORPORATION
	DUCK APPAREL COMPANY, INC.
	DUCK APPAREL COMPANY, INC.
PROFILE INSIDE CIRCL	DUCK APPAREL COMPANY, INC.
COLOR DESIGN	DUCK APPAREL COMPANY, INC.
	FEDERAL EQUIPMENT CORPORATION
GN	TRUEVISION, INC.
	EMERSON ELECTRONIC COMPANY
FOR MEN BOTTLE	CALVIN KLEIN COSMETIC CORP.
	TIMBERLAND COMPANY
DESIGN LOGO	TIMBERLAND COMPANY
ODUCTS	ALL STATE WELDING PRODUCTS INC.
	COMBE INCORPORATED

U.S. CUSTOMS SERVICE

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–68)

B.F. GOODRICH CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–05–00228

OPINION

[Plaintiff moves for same condition substitution drawback, under 19 U.S.C. § 1313(j)(2) (1991), alleging that the Customs Service improperly required it to have actual possession of the duty-paid imported merchandise. Plaintiff also moves to set aside 19 C.F.R. § 191.141(h) because it was promulgated without proper notice and comment pursuant to 5 U.S.C. § 553 (1991). *Held:* The statute does not require actual possession of the imported merchandise; 19 C.F.R. § 191.141(h) was improperly promulgated and constituted a modification, rather than an interpretation, of the statute. Judgment for plaintiff.]

(Decided May 12, 1992)

Thompson, Hine and Flory, (*Lewe B. Martin*, *Peter A. Green* and *John C. Steinberger*, on brief) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Carla Garcia-Benitez*) for defendant.

I. INTRODUCTION

MUSGRAVE, *Judge:* This case involves "substitution same condition drawback," ("SSC drawback") 19 U.S.C. § 1313(j)(2) (1991), of polyvinyl chloride ("PVC") resins. Plaintiff The B.F. Goodrich Company ("Goodrich") exported PVC resins made in Western Canada by its Canadian subsidiary to its customers in the Western United States in 1986, and later exported fungible goods made by Goodrich in the Eastern United States to its Eastern Canadian customers. The Customs Service denied Goodrich's claim for SSC drawback on the grounds that Goodrich did not have possession of the imported PVC resins while those goods were in the United States. Plaintiff's Statement of Material Facts, at 3–4. Goodrich's subsequent protest was deemed denied on December 15, 1989. *Id.* at 4.

Goodrich argues that § 1313(j)(2) does not require that an exporter have possession of the imported goods after importation but before exportation of the substituted same condition goods, and that Customs unjustifiably required that Goodrich have had possession of the imported

goods.[1] The government argues that because Goodrich did not legally possess the imported merchandise after importation, it did not comply with 19 U.S.C. § 1313(j)(2), and the Customs Service regulations interpreting it, primarily 19 C.F.R. § 191.141(h). Defendant's Opposition, at 9.

Goodrich claims that 19 C.F.R. § 191.141(h), is a substantive (or "legislative") rule and that its promulgation violated the Administrative Procedure Act ("APA") because it lacked prior notice or an opportunity for public comment. 5 U.S.C. § 553 (1991), Plaintiff's Brief, at 8. The government argues that because the regulation was one of several regulations updated following passage of the Trade and Tariff Act of 1984, neither an explanation nor prior notice or comment is required. Defendant's Brief, at 21–30.

Noting the similarities between this case and *Central Soya Co. v. United States*, 15 CIT ____, 761 F. Supp. 133 (1991), upheld and adopted, ____ Fed. Cir. ____, ____ F.2d ____ (Dock. No. 91–1324, Jan. 28, 1992), and reading the clear language of the statute (as set out below), the Court finds that there is no requirement in 19 U.S.C. § 1313(j)(2) that a drawback claimant possess the *imported* goods upon which a claim for drawback arises after importation. Furthermore, Customs regulation 19 C.F.R. § 191.141(h) is invalid as a notice and comment procedure is required under 5 U.S.C. § 553.

II. Standard of Review

The controlling case on review of an agency's construction of a statute is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. v. N.R.D.C., 467 U.S. 837, 842–43 (1984).[2]

---

[1] Plaintiff's Brief, at 7–8. Although Goodrich may have had legal possession of the PVC resins after importation, it is assumed for the purposes of the cross-motions for summary judgment that they did not possess the imported goods. *Id.* at 7.

[2] *See also*, Scalia, JUDICIAL DEFERENCE TO ADMINISTRATIVE INTERPRETATIONS OF LAW, 1989 Duke L.J. 511.

III. Discussion

The first question presented is whether Congress has spoken to the issue at hand. The issue in this case is whether § 1313(j)(2), which only tangentially mentions imported goods, requires that a drawback claimant possess those goods in the United States. Section 1313(j)(2) provides in pertinent part:

> (j) Same condition drawback.
>
> * * * * * * *
>
> (2) *If there is, with respect to imported merchandise* on which was paid any duty, tax, or fee imposed under Federal law because of its importation, *any other merchandise* (whether imported or domestic) that –
>
> (A) *is fungible with such imported merchandise;*
>
> (B) *is*, before the close of the three-year period beginning on the date of importation of the imported merchandise, *either exported or destroyed* under Customs supervision;
>
> (C) *before such exportation* or destruction –
>
> (i) is not used within the United States, and
>
> (ii) *is in the possession of the party claiming drawback* under this paragraph; and
>
> (D) is in the same condition at the time of exportation or destruction as was the imported merchandise at the time of its importation; then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

19 U.S.C. § 1313(j)(2) (1991) (emphasis added).

Section 1313(j)(2) does not state with the absolute precision which might be desired when the drawback claimant must possess the exported goods. The operative portion of § 1313(j)(2) for purposes of this case can be condensed, to clearly state:

> with respect to [duty-paid] imported merchandise * * *, any *other* [fungible] merchandise * * * [which] is * * * exported * * * [and] * * * before such exportation * * * is in the possession of the party claiming drawback [is qualified for drawback].

From this Court's reading of the statute, it is clear that the possession requirement attaches only to the *exported* goods, not to the imported goods. The operative portion of § 1313(j)(2) with regard to imported goods mentions only that a duty, tax or fee was paid because of their importation. Therefore, § 1313(j)(2) requires only that a drawback claimant have paid the duty, tax or fee for the privilege of importing the goods.

The Customs regulation in question, 19 C.F.R. § 191.141(h) provides:

> (h) Substitution same condition drawback. If legal person X *possesses imported merchandise* (the designated merchandise) *during*

some time interval in period A (defined below) and also possesses other merchandise fungible with it (the substituted merchandise) during the same or different time interval in period A, then 99 percent of the duty paid on the designated merchandise will be refunded as drawback, provided that:

(1) The designated merchandise was in the same condition as imported either at the time of substitution, the time X used it in manufacturing, or at the time X transferred it to another person, whichever occurs first;

(2) The substituted merchandise is in the same condition when exported or destroyed under Customs supervision as was the designated merchandise when imported;

(3) X does not issue a certificate of delivery covering the designated merchandise nor a certificate of manufacture and delivery covering articles manufactured or produced therefrom; and

(4) X maintains records to establish requirements, (1), (2), and (3) of this section and also complies with all relevant requirements of § 191.141 (a) through (g) of this chapter.

Period A (referred to above) begins when X receives the merchandise and ends three years after the importation of said merchandise.

19 C.F.R. § 191.141(h) (1991) (emphasis added).

A. *Congressional Intent:*

The parties agree that Congress intended by enacting 19 U.S.C. § 1313(j)(2), to expedite merchandise handling and inventory control and to simplify the procedures and requirements for obtaining a refund of duties paid. *See*, H. Rep. 1015, 98th Cong., 2d Sess. 64 (1984). Necessarily, that intent involves both domestic and multinational companies which import and export fungible goods on a regular basis. There is no indication that Congress intended to limit the benefits of § 1313(j)(2) to companies with domestic operations only. Congress likely intended to aid all companies, domestic and multinational, to obtain drawback for fungible exported goods without undue administrative bookkeeping.

Customs argues that Congress intended by implication to require commingling of the imported and exported goods and that as a result the imported goods must be made part of the claimant's domestic inventory. The government argues, in essence, that Congress intended to require drawback claimants to use *only* their inventory in the United States as a basis for drawback claims. One implication of the commingling argument is that § 1313(j)(2) would favor American companies without foreign operations, because only those companies would be able to integrate SSC drawback into the normal course of business. Import/export operations which would qualify for SSC drawback almost inevitably require subsidiaries outside the United States to handle administrative affairs in the host country. Defendant would discriminate against these companies by requiring that imports from foreign subsidiaries pass thru the inventory of the U.S. parent. Multinational

companies such as Goodrich would be unable to ship goods produced abroad directly to U.S. customers and claim drawback for fungible exports from their U.S. plants. They would be forced to import the goods to a U.S. plant, then re-ship them to their U.S. customers. The operations of U.S.-only businesses would not be affected because their exports and imports would necessarily come from or go to the U.S. company.

Plaintiff points out that Customs had granted same condition drawback on a FIFO basis before Congress enacted § 1313(j)(2). Plaintiff's Reply, at 17, and citations contained therein. The previous system required that drawback claimants keep separate the substituted and imported goods. Allowing 19 C.F.R. § 191.141(h) to stand would, in effect, nullify the newer, more liberal requirements for SSC drawback enacted by Congress. Customs may not backslide to the previous restrictions on drawback when Congress has clearly eased those requirements.

B. *Legislative History of § 1313(j)(2) is not Contrary to the Language of the Statute:*

Goodrich argues that Congress did not include any language requiring possession of imported merchandise in the bill as passed, and that the language cited by the government from the so-called legislative history was deleted from the final version. Plaintiff's Reply, at 3–5. Although the Court finds the statute clear on its face, the legislative history should be consulted to discover if Congress' actual intent was contrary to the language of the statute. Section 191.141(h) might be upheld if the legislative history contains "a 'clearly expressed legislative intention' contrary to [the language of the statute], which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (citations omitted). The legislative history is clear enough to determine only that Congress did not intend to require possession of the imported goods. *See, Central Soya Co. v. United States*, 15 CIT ____, ____, 761 F. Supp. 133, 139 (legislative history of § 1313(j)(2) is not a "model of clarity").

Central Soya noted that several versions of what became 19 U.S.C. § 1313(j)(2) were proposed. *Central Soya*, 15 CIT at ____, 761 F. Supp. at 139. The first bill (H.R. 4316) required that a drawback claimant be the same person as the importer of the designated merchandise. *Central Soya*, 15 CIT at ____, 761 F. Supp. at 138. The final version of the bill (H.R. 3398) required only that the *substituted* (exported) merchandise must have been in the possession of the party claiming drawback. *Id.* The Conference Committee Reports for each bill contained identical language, that "[d]rawback is provided if the same person requesting drawback * * * exports from the United States * * * fungible merchandise * * *." H.R. Rep. No. 1015, 98th Cong., 2d Sess. 64, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5023, *cited in Central Soya*, 15 CIT at ____, 761 F. Supp. at 138. The Conference Report language relied upon by the government is clearly unrelated to the text of the final bill, an interpretation supported by a letter from the Congressman who

drafted both bills. *Central Soya*, 15 CIT at ____, 761 F. Supp. at 139. As a result, the Court may ignore that section of the Report. *American Hospital Assoc. v. N.L.R.B.*, ____ U.S. ____, ____, 111 S. Ct. 1539, ____, 113 LEd.2d 675, ____ (1991), citing *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168, 109 S. Ct. 2854, 106 LEd.2d 134 (1989) (legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute).

The statute clearly *does not* include the possession requirement that Customs attempts to graft onto it. The statute is conspicuously silent as to that requirement. There is no other indication from the legislative history that such a requirement is to be inferred. The plain language of the statute states that, with respect to imported goods "on which was paid any duty * * *," certain other *exported* goods might qualify for drawback. 19 U.S.C. § 1313(j)(2). "No other condition is stated [for imported merchandise to qualify as the basis of a drawback claim], and the only rational interpretation is, none is meant." *Madison Galleries, Ltd. v. United States*, 7 Fed. Cir. (T) 56, 60, 870 F.2d 627, 631 (1989).

The possession requirement was considered by Congress but rejected when it enacted § 1313(j)(2). Neither the statutory language nor the legislative history supports Customs' requirement that the claimant of SSC drawback have been the importer of the duty-paid merchandise.

C. *19 U.S.C. § 1313 is not so Silent or Ambiguous that § 191.141(h) is Permissible:*

That the statute *does* not include the requirement that Customs would impose does not automatically mean that the Court must proceed to the second step of the *Chevron* analysis. *Chevron* instructs that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The government argues that the statutory language is silent or ambiguous on the requirement of possession, and that Customs' interpretation is a permissible construction of the statute, in light of the legislative history. Defendant's Reply, at 6, citing *Neptune Mut. Ass'n, Ltd. of Bermuda v. United States*, 862 F.2d 1546, 1549 (Fed. Cir. 1988) ("Because a literal interpretation of the statute leads to a result at variance with the policy of the [statute], [the court should] turn to the legislative history of the statutes in question * * *").

The government's argument under *Neptune Mutual* is backwards. As is often the case, the legislative history of § 1313(j)(2) is ambiguous, not the statute. Indeed, as shown above, the language in the Conference Report of H.R. 3398 is an unreliable indicator of the intent of the drafters of the bill. A literal interpretation of the statute delivers results in accordance with the liberalizing policy behind the statute.

Section 1313(j)(2) is not so silent or ambiguous that the Court should prefer the Conference Report, or other portions of the legislative history, to the language of the statute. The requirements for imported mer-

chandise are simple; indeed, most of § 1313(j)(2) deals with the requirements that *exported* merchandise must meet. Section 1313(j)(2) clearly and unambiguously states that imported merchandise, "on which was paid any duty, tax, or fee imposed under Federal law because of its importation" qualifies for drawback if the substituted goods fulfill the other requirements (fungibility, exportation, possession before export, etc.). 19 U.S.C. § 1313(j)(2). To hold otherwise would ignore the plain language of the statute. *Chevron*, 467 U.S. at 842–43 (courts must give effect to "the unambiguously expressed intent of Congress").

Congress' intent to lift some of the administrative burden of SSC drawback is clearly expressed in § 1313(j)(2). One of the burdensome requirements of the FIFO drawback system which preceded § 1313(j)(2), was that a claimant needed to show which merchandise entered into the domestic inventory at which time, and to keep those inventories separate. See, cases cited at p. 17 of Plaintiffs Memorandum. The Court finds that Congress intentionally eliminated this requirement when presented with the option to retain some sort of possession requirement for imported goods.

D. *A Possession Requirement Cannot be Inferred From Other Sections of 19 U.S.C. § 1313:*

The government argues that the possession requirement may be inferred from the design of the drawback statute taken as a whole. Defendant's Reply, at 3. Because § 1313(j)(2) does not specifically address the relationship between the drawback claimant and the imported merchandise, the government infers a possession requirement from the manufacturing drawback statute, 19 U.S.C. § 1313(b) (1991). Defendant's Reply, at 6. However, it is clear that such inferences may not be drawn. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 LEd.2d 17 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Customs may not graft onto the apparent purpose behind § 1313(j)(2) (easing the administrative burden of SSC drawback) the additional requirement that a claimant possess the goods once imported. *See, M.M. & P. Maritime Advancement, Training, Educ. & Safety Program (Mates) v. Dept. of Commerce*, 729 F.2d 748, 752, 2 Fed. Cir. (T) 36, 40 (1984) (Customs improperly required that goods imported for "educational or scientific" purposes must be used in formal science-oriented training in order to qualify for duty-free entry).

IV. The Regulation was Enacted in Violation of the Administrative Procedure Act

Customs enacted 19 C.F.R. § 191.141(h) following passage of the Trade and Tariff Act of 1984, which liberalized requirements for SSC drawback. Customs argues that it did not follow the APA notice and

comment procedures because the changes made were "nonsubstantive and essentially * * * procedural." T.D. 85–123, 19 Cust. Bull. 276 (1985). Customs stated at the time that "[i]nasmuch as these amendments merely conform the Customs Regulations to existing law or practice, pursuant to 5 U.S.C. § 553(b)(B), [sic] notice and public procedure thereon are unnecessary * * *." *Id.*, at 282.

Under the APA, 5 U.S.C. § 553, *et seq.*, advance publication and an opportunity for public participation are required for all rules except "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice," or "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(A)–(B) (1988). Customs claims that 19 C.F.R. § 191.141(h) simply interprets and updates longstanding requirements following the passage of the Trade and Tariff Act of 1984. Customs enacted § 191.141(h) "merely [to clarify] the requirements Congress intended to exact before a drawback claim could be allowed." Defendant's Opposition, at 34 (footnote omitted). The rule enacted does not include a statement that notice and public comment were impracticable, unnecessary or contrary to the public interest. Customs argues that none is required because the rule was an interpretation that "merely clarifies the existing duties of a drawback claimant." Defendant's Opposition, at 38.

However, Customs established a substantive new requirement that does not exist in the statute. As such, 19 C.F.R. § 191.141(h) is a substantive rule for which a notice and comment period, among other things, is required. 5 U.S.C. § 553(b)–(c); *Batterton v. Marshall*, 648 F.2d 694, 208 U.S. App. D.C. 321 (1980).

A. *Customs' Mandate To Interpret § 1313(j)(2) Does not Extend to Adding Requirements:*

The *Central Soya* Court addressed and rejected the Customs Service's argument that it had "an extraordinarily broad mandate," within the grant of legislative authority given in 19 U.S.C. § 1313(1), to "' prescribe' substantive rules regarding specific subjects, which include 'the designation of the person to whom any refund or payment of drawback shall be made."' *Central Soya*, 15 CIT at ____, 761 F. Supp. at 139.

It is axiomatic that even if the APA requirements were complied with (i.e. notice and comment, hearings, etc.) the Customs Service would not automatically be authorized to amend and enlarge the scope of 19 U.S.C. § 1313(j)(2). *Batterton v. Marshall*, 648 F.2d at 701–702 (legislative or substantive rules can only be issued if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area).

As it now stands, 19 C.F.R. § 191.141(h) is a modification, rather than an interpretation of 19 U.S.C. § 1313(j)(2). The requirement that drawback claimants have possession of the goods in the United States is not

merely an interpretation of the statutory language because it actually prescribes new requirements not found anywhere in the statute. *Batterton v. Marshall*, 648 F.2d at 705–706 and 711 ("Normally a judicial determination of a procedural defect requires invalidation of the challenged rule"). The Court again rejects the government's contention that the Customs Service has "an extraordinarily broad mandate" to interpret § 1313(j)(2). The regulation, 19 C.F.R. § 191.141(h), is invalid.

In *Central Soya*, the Court ordered that Customs amend 19 C.F.R. § 191.141(h) in accordance with that decision. Customs must also comply with the APA notice and comment procedures until a new regulation is promulgated. Until such procedures are complied with, 19 U.S.C. § 191.141(h) is suspended and shall have no force or effect, although Customs shall not use the invalidation of the regulation as an excuse to refuse drawback to otherwise qualified claimants. Until a new rule is promulgated, Customs shall allow SSC drawback claims based solely on the language of 19 U.S.C. § 1313(j)(2), and case law interpreting it.

V. Conclusion

Customs improperly required that Goodrich demonstrate that it possessed the imported merchandise from which Goodrich's drawback claim arose: 19 U.S.C. § 1313(j)(2) contains no such requirement. A careful consideration of the legislative history demonstrates that Congress did not intend otherwise. 19 C.F.R. § 191.141(h) was an improperly promulgated substantive rule, with no justification in either the statute or the legislative history. As a result, it must have no force or effect.

Because of this Court's ruling, Counts 3 and 4 of the Complaint are moot and hereby dismissed.

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